

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:POSTF-116857-02

JAMoon

date: APR 29 2002

to: Examination Division
Attention: [REDACTED] Team Manager
[REDACTED], Team Coordinator
Group RFPH [REDACTED] [REDACTED]

from: June Y. Bass, Associate Area Counsel, LMSB
Jenny A. Moon, Attorney

subject: Taxpayer: [REDACTED], Inc.
Issue: Securing Statute Extensions for [REDACTED], [REDACTED], [REDACTED], [REDACTED]
[REDACTED], and [REDACTED]
Current Statute of Limitations: [REDACTED]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated March 14, 2002. This memorandum should not be cited as precedent.

ISSUE

How should the taxpayer's name be captioned on Form 872, Consent to Extend the Time to Assess Tax, for each of the following taxable periods ended:

- a. September 31, [REDACTED]
- b. September 31, [REDACTED]
- c. September 31, [REDACTED]
- d. December 31, [REDACTED]
- e. December 31, [REDACTED], and

¹ Another attorney in this office is in the process of rendering advice on whether the current Form 872, which extends

f. December 31, [REDACTED].

RECOMMENDATIONS

During the years at issue, two corporations were known as "[REDACTED], Inc."

For the taxable years ended September 31, [REDACTED], September 31, [REDACTED], September 31, [REDACTED], and December 31, [REDACTED], the consolidated federal income tax returns were filed by [REDACTED], Inc., with E.I.N. [REDACTED], whereas for the taxable years ended December 31, [REDACTED], and December 31, [REDACTED], the consolidated federal income tax returns were filed by [REDACTED], Inc., with E.I.N. [REDACTED].

Thus, it is imperative that you secure two separate Forms 872, as follows:

(1) For the taxable years ended [REDACTED], [REDACTED], [REDACTED] and [REDACTED]

[REDACTED], Inc. is the proper party to sign the Form 872, to be captioned as follows:

[REDACTED] Inc.,
(E.I.N. XX) (formerly known as [REDACTED]
[REDACTED] Corporation) as
successor in interest to [REDACTED]
[REDACTED], Inc. (E.I.N. [REDACTED]) (formerly
known as [REDACTED] Inc.) and
alternative agent for the group*

We recommend that on the front of the Form 872 the asterisk should refer to the following:

*This is with respect to the consolidated Federal income tax liability of the [REDACTED], Inc. and subsidiaries (E.I.N. [REDACTED]) consolidated group for the taxable years ended September 30, [REDACTED], September 30, [REDACTED], September, 30, [REDACTED], and the short taxable year ended December 31, [REDACTED].

the assessment period to [REDACTED], is valid with respect to taxable year ended December 31, [REDACTED]. For purposes of this memorandum, we have assumed that the current Form 872 is valid with respect to this year. If you have any questions with respect to this matter, please contact our office.

The signature block on the Form 872 should read as follows:

[REDACTED] Inc.
(E.I.N. XX).

The signature block should be signed by a current officer of [REDACTED], Inc., and you should make sure that [REDACTED] Inc. is still in existence at the time the Form 872 is procured.

(2) For the taxable years ended [REDACTED] and [REDACTED]

[REDACTED] Inc. (E.I.N. [REDACTED]) is the proper party to sign the Form 872, to be captioned as follows:

[REDACTED] Inc. and
subsidiaries (E.I.N. [REDACTED]) (formerly
known as [REDACTED], Inc.)*

We recommend that on the front of the Form 872 the asterisk should refer to the following:

*This is with respect to the consolidated Federal income tax liability of the [REDACTED] [REDACTED] Inc. and subsidiaries (E.I.N. [REDACTED]) consolidated group for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED].

The signature block on the Form 872 should read as follows:

[REDACTED] Inc. (E.I.N. [REDACTED])
[REDACTED].

The signature block should be signed by a current officer of [REDACTED] Inc. (E.I.N. [REDACTED]), and you should make sure that [REDACTED] Inc. (E.I.N. [REDACTED]) is still in existence at the time the Form 872 is procured.

In addition, please double-check all names and EINs. Furthermore, each time you request a statute extension, please advise the taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time.

FACTS²

[REDACTED], Inc. ("old-[REDACTED]"; EIN [REDACTED]) was a common parent of a consolidated group. [REDACTED] Corporation ("[REDACTED]") was a common parent of another consolidated group.

On [REDACTED], [REDACTED] Inc. ("old-[REDACTED]") was merged into [REDACTED] (a wholly-owned subsidiary of [REDACTED]), which immediately changed its name to [REDACTED] Inc. ("new-[REDACTED]").

During [REDACTED], old-[REDACTED] formed 3 corporations: (1) [REDACTED], Inc. (EIN [REDACTED]); (2) [REDACTED] Corp., a wholly-owned subsidiary of [REDACTED], Inc.; and (3) [REDACTED] Corp., also a wholly-owned subsidiary of [REDACTED], Inc.

On [REDACTED], two reorganizations took place: (1) [REDACTED] Corp. was merged into old-[REDACTED]; and (2) [REDACTED] Corp. was merged into [REDACTED] such that old-[REDACTED] and [REDACTED] became wholly-owned subsidiaries of [REDACTED], Inc.³

On or before [REDACTED], [REDACTED], Inc. changed its name to [REDACTED], Inc. ("new-[REDACTED]"; same EIN as [REDACTED], Inc.) and old-[REDACTED] changed its name to [REDACTED], Inc.

On [REDACTED], [REDACTED] Corporation, a wholly-owned subsidiary of new-[REDACTED], changed its name to [REDACTED], Inc. ("[REDACTED]").

On [REDACTED], new-[REDACTED] merged into [REDACTED].

² The facts stated herein are based on the documents and information you have provided. **We have not undertaken any independent investigation of the facts of this case.** If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

³ On [REDACTED], the respective shareholders of old-[REDACTED] and [REDACTED] received shares of [REDACTED], Inc. in conjunction with a simultaneous merger of [REDACTED] Corporation into old-[REDACTED] and a simultaneous merger of [REDACTED] into [REDACTED]. These reorganizations were treated as I.R.C. § 351(a) transactions in which the respective shareholders of [REDACTED] and old-[REDACTED] transferred their stock to [REDACTED], Inc. in exchange for stock in [REDACTED], Inc. followed by the aforesaid mergers.

Effective [REDACTED], [REDACTED] was merged downstream into [REDACTED]. [REDACTED] thereby became and still is a wholly-owned first tier holding company of new-[REDACTED]

Also, effective [REDACTED], [REDACTED] Inc. (i.e., old-[REDACTED]) was merged into [REDACTED]. Paragraph [REDACTED] of the Plan of Merger states in part, "[REDACTED] shall assume and be responsible and liable for all liabilities and obligations of [REDACTED] Inc.] as required by [REDACTED] law." Article [REDACTED] of the Plan of Merger states that it is to be governed by the laws of the State of [REDACTED].

For each of the relevant tax periods, a consolidated federal income tax return was filed by the following parent corporation:

<u>Tax Year Ended</u>	<u>Entity</u>	<u>EIN</u>
[REDACTED]	old-[REDACTED]	[REDACTED]
[REDACTED]	old-[REDACTED]	[REDACTED]
[REDACTED]	old-[REDACTED]	[REDACTED]
[REDACTED]	old-[REDACTED]	[REDACTED]
[REDACTED]	new-[REDACTED]	[REDACTED]
[REDACTED]	new-[REDACTED]	[REDACTED]

Thus, even though the consolidated federal income tax returns for the foregoing years were filed under the same name, they were filed by two separate corporations with different EINs.

DISCUSSION

I. The Law

In general, the common parent corporation and each subsidiary which was a member of the group during any part of the consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

⁴ The taxpayer filed a Form 1128, "Application to Adopt, Change or Retain a Tax Year," to change its fiscal year-end from September 30 to December 31. Permission was granted by the Service, and the taxpayer filed a short-year return for the period [REDACTED] through [REDACTED]

⁵ As indicated above, old-[REDACTED] was a wholly-owned subsidiary of new-[REDACTED] during the taxable years ended December 31, [REDACTED] and December 31, [REDACTED].

Generally, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id.

An agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year is applicable to each corporation which was a member of the group during any part of such taxable year, and to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of § 1.1502-75. Treas. Reg. § 1.1502-77(c).

Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

If for any reason the common parent corporation's existence is about to terminate, the regulations require that it notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. Treas. Reg. § 1.1502-77(d).

If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of such district director, designate another member to act as such agent, and notice of such designation shall be given to such district director. Id. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability. Id.

Temp. Reg. § 1.1502-77T, promulgated in 1988 to supplement

Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). In general, where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations.

Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which § 381(a) applies,

(iii) The agent designated by the group under § 1.1502-77(d), or

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

With regards to Temp. Reg. § 1.1502-77T(a)(4)(ii) above, I.R.C. § 381 provides in relevant part that in a transfer of assets to which I.R.C. § 361 applies, and which is in connection with a reorganization described in I.R.C. § 368(a)(1)(A), the acquiring corporation succeeds to and takes account into the items of the transferor corporation described in I.R.C. § 381(c).

Section 361(a) provides that no gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Section 368 defines what constitutes a reorganization within the meaning of I.R.C. § 361. Section 368(a)(1)(A) provides that the term "reorganization" means "a statutory merger or consolidation".

II. Analysis

A. Old- [REDACTED]

1. Application of Law to Facts

Old-█████ filed as the common parent for years ended █████, █████, and █████.

The facts suggest a valid I.R.C. § 368(a)(1)(A) statutory merger under [REDACTED] law, in which the assets and obligations of old-[REDACTED] were transferred to or merged into [REDACTED] and the outstanding stock certificates of old-[REDACTED] became shares in the surviving corporation [REDACTED]. Section 361 would apply to this merger, and consequently, I.R.C. § 381 would also apply to the transaction. Therefore, [REDACTED] was a successor to the former common parent old-[REDACTED] in a transaction to which I.R.C. § 381(a) applies, and [REDACTED] should qualify to act as an alternative agent for the old-[REDACTED] group pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii).

In addition, since [REDACTED] was a successor to old-[REDACTED] under state law, it succeeded to the consolidated tax liability of old-[REDACTED], and is liable under state law for this liability. Therefore, in addition to being an alternative agent for the [REDACTED] group, [REDACTED] is a successor to [REDACTED]'s tax liability under state law. This is an additional reason for obtaining the Form 872 from [REDACTED].

2. Recommendation

For the taxable years ended [REDACTED], [REDACTED], [REDACTED], and [REDACTED], is the proper party to sign the Form 872, to be captioned as follows:

[REDACTED] Inc.,
(E.I.N. XX) (formerly known as [REDACTED]
[REDACTED] Corporation) as
successor in interest to [REDACTED]
[REDACTED], Inc. (E.I.N. [REDACTED] (formerly
known as [REDACTED], Inc.) and
alternative agent for the group*

We recommend that on the front of the Form 872 the asterisk should refer to the following:

*This is with respect to the consolidated Federal income tax liability of the [REDACTED], Inc. and subsidiaries (E.I.N. [REDACTED]) consolidated group for the taxable years ended September 30, [REDACTED], September 30, [REDACTED], September, 30, [REDACTED], and the short taxable year ended December 31, [REDACTED].

The signature block on the Form 872 should read as follows:

[REDACTED], Inc.
(E.I.N. XX).

The signature block should be signed by a current officer of

Please make sure that [REDACTED] is still in existence at the time the Form 872 is procured.

B. New- [REDACTED]

1. Application of Law to Facts

New-█████ filed as the common parent for the taxable years ended █████ and █████ during which old-█████ was a wholly owned subsidiary of new-█████.

As the common parent, new- [REDACTED] (assuming it is still in existence) is duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year, and is the proper party from whom the Form 872 should be procured.

2. Recommendation

For the taxable years ended [REDACTED] and [REDACTED], new-[REDACTED] is the proper party to sign the Form 872, to be captioned as follows:

[REDACTED] Inc. and subsidiaries (E.I.N. [REDACTED]) (formerly known as [REDACTED], Inc.)*

We recommend that on the front of the Form 872 the asterisk should refer to the following:

*This is with respect to the consolidated Federal income tax liability of the [REDACTED], Inc. and subsidiaries (E.I.N. [REDACTED]) consolidated group for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED]

The signature block on the Form 872 should read as follows:

[REDACTED] Inc. (E.I.N. [REDACTED])

The signature block should be signed by a current officer of new-██████.

Please make sure that new-[REDACTED] is still in existence at the time the Form 872 is procured.

III. Additional Recommendations

Please double-check all names and EINs.

Moreover, under I.R.C. § 6501(c)(4)(B), the Service should advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time the Service requests a statute extension.

In addition, at the bottom of each Form 872, include the following statement: "In executing this Form 872, taxpayer acknowledges that it has been advised by Exam of its right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame, pursuant to I.R.C. § 6501(c)(4)(B)."

If you have any questions, please contact Jenny A. Moon at 949-360-2689.